Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974
NO. 74-1107

FRANCIS LEO CAPPAERT,
MARILYN I. CAPPAERT, et al., Petitioners

v.

UNITED STATES OF AMERICA, Respondent

NO. 74-1304

STATE OF NEVADA, ex rel.
ROLAND D. WESTERGARD,
State Engineer, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amici Curiae in Support of Petitioners

STATE OF COLORADO
J. D. MacFARLANE,
Attorney General

JEAN E. DUBOFSKY,
Deputy Attorney General

EDWARD G. DONOVAN,
Solicitor General

DAVID W. ROBBINS,
First Assistant Attorney General
Natural Resources Section

CHARLES M. ELLIOTT,
Special Assistant Attorney General
Natural Resources Section
104 State Capitol
Denver, Colorado 80203

STATE OF NORTH DAKOTA
ALLEN I. OLSON
Attorney General

GERALD W. VANDEWALLE
Chief Deputy Attorney General
State Capitol
Bismarck, North Dakota 58501

STATE OF WASHINGTON
SLADE GORTON,
Attorney General

CHARLES B. ROE,
Senior Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

PEERLESS PRINTING CO., 1989 BROADWAY, DENVER, COLORADO 80202

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974
NO. 74-1107

FRANCIS LEO CAPPAERT,
MARILYN I. CAPPAERT, et al., Petitioners

v.

UNITED STATES OF AMERICA, Respondent

NO. 74-1304

STATE OF NEVADA ex rel.
ROLAND D. WESTERGARD, State Engineer,
Petitioner,

V.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Brief of Amici Curiae in Support of Petitioners

I. INTEREST OF THE AMICI CURIAE

Throughout our nation's history it has been general federal legislative policy that the allocation of rights to divert, withdraw and make use of surface and ground waters within a state is the primary responsibility of the

state governments. [1]/ The wisdom of a national policy providing for the operation of a centralized, unified water rights allocation and regulation program by each state for waters within each state has not, to this day been seriously challenged by any congressional enactment. Indeed the most recent federal legislative guideposts point to continued support of centralized state water rights allocation and regulation systems: namely, the "McCarran Amendment" of 1952, 43 U.S.C. 666. See also *United States v. District Court in and for the County of Eagle,* 401 U.S. 520 (1971).

In recent years a new specie of water right, completely foreign to western water law, known as the federal "reserved right", has come into being. [2]/ This latter day revelation, primarily the product of the imagination, persuasive abilities and persistent efforts of the United States Department of Justice during the past two decades, offers a distinct threat to the effectiveness of long established, state administered water rights programs. Perhaps even more importantly, it threatens the integrity of real property interests, relied upon by so many, created under such state programs.

The States of Colorado, North Dakota and Washington submit this brief in order to point out their apprehensions regarding the potentially disastrous consequences of the federal "reserved right" as a matter of both national and state policy, if its bounds are not conservatively described. Amici curiae fear not only for the disruption

---

[1] Congressional enactments supporting this conclusion include: Act of July 26, 1866, 43 U.S.C. §661: Act of July 9, 1870, 43 U.S.C. §661; Desert Land Act of 1877, 43 U.S.C. §321 et seq.; Reclamation Act of 1902, 43 U.S.C. §383, Federal Power Act of 1920, 16 U.S.C. §821; and Boulder Canyon Project Act, 43 U.S.C. §617 q.

[2] Perhaps the most exhaustive and scholarly discussion of the federal "reserved right" is found in 1*Corker and Wheatley, Study of the Development, Management and Use of Water Resources on Public Lands* 80-199 (1969).

of long established local economies throughout the western United States, but for future developments as well.

Certainty of water rights and the existence of a unified, comprehensive regulatory design have been integral to the settlement and economic growth of the arid and semi-arid West. If the United States is allowed to circumvent the historic function of states to determine water rights, as recognized in *United States v. District Court in and for the County of Eagle,* 401 U.S. 520 (1971), and *United States v. District Court in and for Water Division No. 5,* 401 U.S. 527 (1971), and to obtain monopolistic rights to underground waters, unrestricted by the happenings of the past, the extensive efforts of amici curiae to further develop their water right systems will prove to be largely nugatory.

Stated succinctly, the amici curiae believe that the decision of the Court of Appeals, 508 F.2d 383 (9th Cir. 1974), contains an improperly broad interpretation of the doctrine of federal water rights based on a theory of implied reservation. While the preservation of the pupfish (cyprinodon diabolis) which inhabit Devil's Hole pool of Death Valley National Monument is of national importance (and amici curiae support their preservation), that objective does not warrant a broadening of the implied reservation doctrine based upon the easy fashioned reasoning of the lower court. [3]/ This case involves only the "maintenance" of a groundwater level on federally reserved land under the Act for the Preservation of Ameri-

---

[3] We note in passing that failure of the United States to establish a reserved right does not result in the loss of the public project or interest which requires the water right. It only means the United States *may* have to acquire the water right through a compensatory method. As pointed out in Trelease *Federal State Relations in Water Law, 147 1. (1971),* the reserved right is a "financial doctrine" utilized by the United States to save money.

can Antiquities, 16 U.S.C. 431. It does not consider any affirmative changing of the groundwater level under the reservation doctrine.

This court has not often opined about the implied reservation doctrine. Indeed a combination of *Winters v. United States,* 207 U.S. 564 (1908), and *Arizona v. California,* 373 U.S. 546 (1963), and 376 U.S. 340 (1964), covers the field. This court has not yet decided a wide range of issues involving the establishment of a reserved right and the nature and extent of such a right. In deciding this case, the amici curiae request that the following issues be carefully considered:

1. The burden of proof (or required showing) placed upon the United States in establishing an *implied* intent to reserve waters upon the creation of a reservation (other than reservations established by a treaty with the Indians, which are not involved here), and;

2. The special burden which falls upon the United States when such rights are claimed for ground waters.

II. ARGUMENT

GROUNDWATER SHOULD NOT BE SUBJECT TO THE IMPLIED RESERVATION DOCTRINE. IF IT IS, THE UNITED STATES MUST OVERCOME A PRESUMPTION AGAINST THE INTENT TO RESERVE GROUNDWATER AND MUST PROVIDE SUBSTANTIAL EVIDENCE OF THAT INTENT.

Any decision by this Court should consider very carefully the potential vast, deleterious consequences of extending the theory of implied reserved water rights to groundwater. Underground water supplies have assumed

a major role in the economies of amici curiae. While, as to surface waters, western water users have conceivably been on notice since *Winters v. United States,* 207 U.S. 564 (1908), that implied water rights may be appurtenant to Indian reservations and after *Arizona v. California,* 373 U.S. 546 (1963), that implied water rights may be appurtenant to other federal reservations, there has never been any indication that similar, hybrid rights in groundwater might exist. Our thesis is that, in light of history, groundwater simply does not fit comfortably within the theoretical parameters of the implied reserevation doctrine because the essential element of intent cannot be satisfied. The existence of feasible groundwater supplies, especially in early days, was not known. Lacking knowledge of this resource, rights thereto could not impliedly reserved.

Additionally, there is a sound policy basis for not expanding the implied reservation doctrine to groundwater. This doctrine, founded in equity, should not now be used as a sword by the federal government to do injustice. Perhaps at one time the implied reservation of water could be justified to prevent unconscionable consequences to those dealing with the United States or to protect the interests of the United States. However, over the past decades the equities have changed. The failure of the federal government to expressly reserve a water right can no longer be rectified by the courts without, in far too many instances, extinguishment of vested water rights, dislocation of local economies, and damage to the fabric and unity of the state water right determination and administration schemes. It is now time for this Court to amplify upon the judicially-fashioned, equitable tool of reserved rights to assure that in the future equity will prevail for all elements of society.

A foremost concern of amici curiae is the issue of the proof of the intent necessary to establish a reserved right. This Court should place an extremely heavy burden on the United States to show the requisite intent to impliedly reserve groundwaters. The element of intent has been the cornerstone of reserved rights. Meyers, *"The Colorado River"*, 19 *Stand L. Rev.* [1] (1966).

There can be no showing of intent to have reserved the groundwater unless the documents surrounding the setting out of the reservation clearly indicate that it was so intended. Such an intention should include a showing not only that the originators of the reservation knew of the existence of groundwater but that they contemplated the need claimed in order to fulfill the purpose of the reservation. Further, the United States must provide satisfactory reasons for not expressly making the reservation at the outset. Lacking any of these elements, the United States has failed to satisfy the burden of proof.

The mere establishment of a reservation as suggested by the Court of Appeals below is not sufficient, in and of itself, to also establish a claim to water rights. The reserving party's intent to reserve the waters must be shown.

> "In the *Winters* case, as in this, the basic question for determination was one of intent — . . .
>
> The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved."
>
> *United States v. Walker River Irrigation District,* 104 F.2d 334, 336 (9th Cir. 1939).

Amici curiae acknowledge the presence of two prior cases that appear to extend the *Winters* doctrine to groundwater. However, neither case has precedential value for the case at bar. In both cases, *Nevada ex rel. Shamberger v. U.S.*, 165 F.Supp. 600 (D. Nev. 1958), and *Tweedy v. Texas Company,* 286 F.Supp. 383 (D. Mont. 1968), a careful reading of the courts' decisions show that they were both based upon grounds other than the implied reservation doctrine and the discussions of the reservation of groundwater were merely dicta. *Shamberger* was affirmed due to the lack of consent to sue the federal government. *Nevada ex rel. Shamberger v. U.S.,* 279 F.2d 699 (9th Cir. 1960). In *Tweedy,* the court refused to grant reserved rights because no use or need for groundwater had been shown by the claimants; the court's remarks as to the application of the *Winters* doctrine to groundwater were superfluous.

Amici curiae urge that unless there is a showing that the groundwater resources were recognized at the time of the reservation, the intent requirement set forth in *Winters* and subsequent decisions cannot be met. The United States must bear the responsibility of establishing that the waters claimed to be impliedly reserved were actually capable of comprehension by the party making the land reservation and were actually necessary to carry out the reservation's purpose. Since groundwater resources were largely unknown at the time of most federal land reservations and rarely were acknowledged as feasible sources of supply, there should be a presumption against the existence of the requisite intent to reserve groundwater. Such a presumption is further supported by the laches of the United States in seeking to confirm its claimed water rights within a reasonable time, the disruption and inequities created by such claims and the underlying fact

that the confusion and abuses which accompany the assertion of implied water rights could have been easily avoided had the United States simply expressed its need for a water right and confirmed its right through the state system at the time of the land reservation.

The scarcity of water in the arid and semi-arid West has compelled state action to assure certainty, efficiency and maximum utilization of this keystone resource. Amici curiae have developed and refined fair and comprehensive systems for the determination and regulation of water rights. The United States threatens these prudent state actions by advancing a bastard legal theory which claims the most favorable features of both the prior appropriation and riparian doctrines of water law yet refuses to accept any of the burdens or limitations which inhere in these doctrines. The forces of equity and reason compel the application of the presumptions and burdens set out above, and the fundamental, reasonable limitations of the riparian and prior appropriation doctrines, to the claims of the federal government.[4/]

In summary, amici curiae urge this Court to view federal reserved water claims from an equitable, common sense perspective. The doctrine of implied federal water rights was an equitable, judicial response to the "absent-mindedness[5/] of the United States in dealing with Native Americans. *Winters v. United States*, 207 U.S. 564 (1908). It was never intended to be a tool of the federal government for saving money at the expense of disrupting the economies of the western states. If it is to be applied at all, this Court should command that it be done equitably

[4] Both water law doctrines require a standard of reasonableness in the exercise of a right to the use of water and both reject monopolistic rights.

[5] See, Corker, "Federal-State Relations in Water Rights Adjudication and Administration", 17 *Rocky Mt. Min. L. Inst.* 579, n. 7 (1971).

and not with utter disregard for rights established pursuant to state law.

III. CONCLUSION

For the reasons expressed above, this Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

STATE OF COLORADO
J. D. MacFARLANE,
Attorney General

JEAN E. DUBOFSKY,
Deputy Attorney General

EDWARD G. DONOVAN,
Solicitor General

DAVID W. ROBBINS,
First Assistant Attorney General
Natural Resources Section

CHARLES M. ELLIOTT,
Special Assistant Attorney General
Natural Resources Section
104 State Capitol
Denver, Colorado 80203

STATE OF NORTH DAKOTA
ALLEN I. OLSON
Attorney General

GERALD W. VANDEWALLE
Chief Deputy Attorney General
State Capitol
Bismarck, North Dakota 58501

STATE OF WASHINGTON
SLADE GORTON,
Attorney General

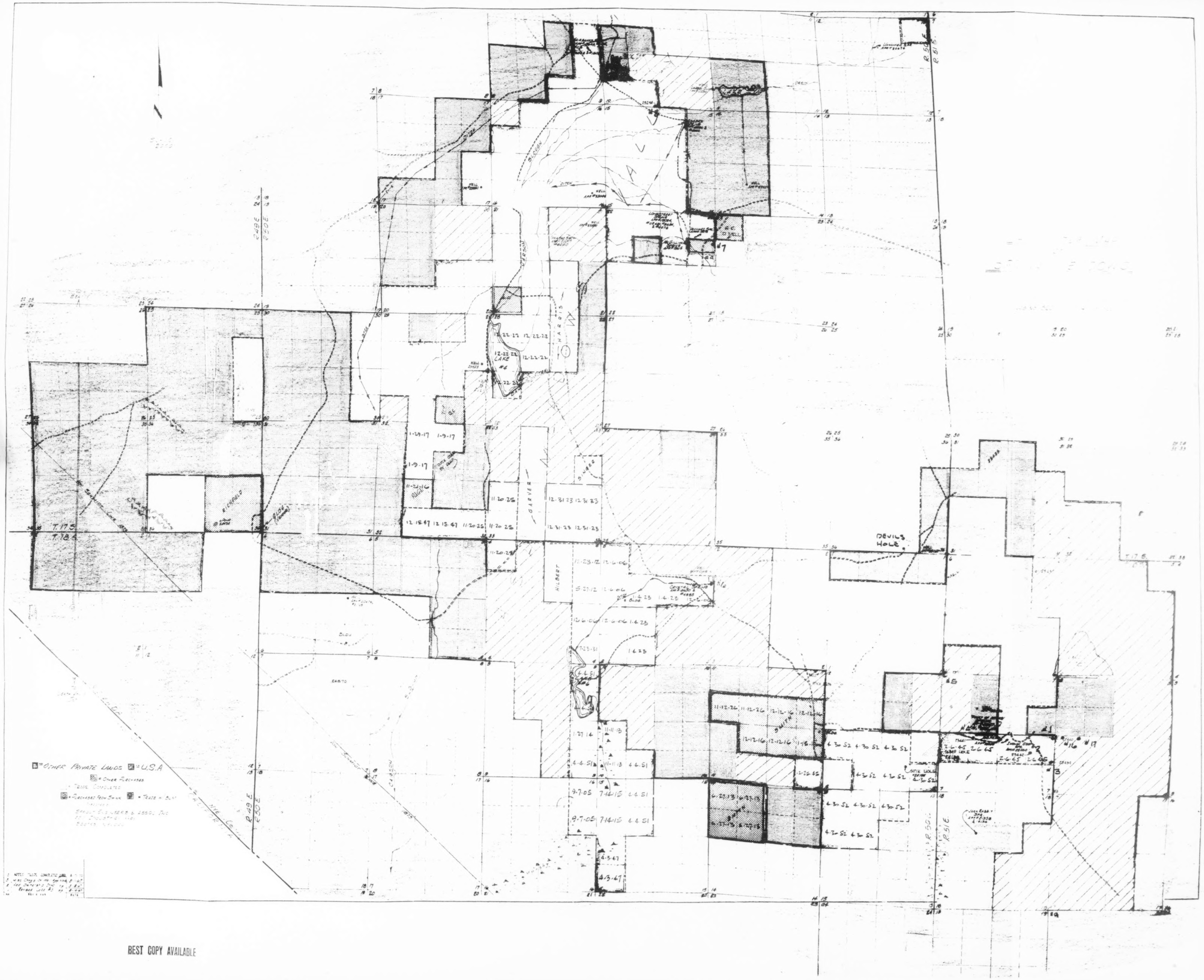
CHARLES B. ROE,
Senior Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

see

74

1304

1



BEST COPY AVAILABLE